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ETHICS AND THE MILITARY PROFESSION. A DIALOGUE ON THE LAW OF WA--ETC(U)
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ETHICS AND THE MILITARY PROFESSION.

APRIL 1980

- A DIALOGUE ON THE LAW OF WAR.
"...nobody really believes it..."

- DEGREES OF RESPONSIBILITY AND
THE LAW OF WAR.

"...if the law fails to be just,
it will be discarded..."

BOOK REVIEWS

The My Lai Inquiry

LTG (RET) William R. Peers

War, Morality, and the Military Profession

COL Malham M. Wakin, USAF

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FOCUS

If ever you feel a perverse need to provoke a heated debate among military personnel, try generating a discussion about the law of war. All soldiers know that the Law of Land Warfare is a formal legal code; that adherence is not a matter of personal preference; and that violations are punishable offenses. But is the law appropriate? Is it effective? Some who would describe themselves as "realists" maintain that combat is not an activity that lends itself to regulation and that we are being hypocritical when we profess to be guided by legal constraints. Others feel that, while the goal of limiting the suffering and destruction of war is noble, the circumstances, particularly of modern war, make application and enforcement of the laws of war impossible. What case can be made in support of such laws?

Since the issue is one that lends itself naturally to debate, the dialogue format introduced in the January, 1980 edition of Ethics and the Military Profession is employed again here. The characters, Victor, Justin, and Henry-David, represent, we believe, attitudes about the law of war that are genuinely popular in the Army. Their fictitious discussion is intended to give the subject a reasonably thorough airing.

In this edition the dialogue is accompanied by a pair of related pieces. Captain Joel Miller of the U.S.M.A. Department of Law, a member of the Judge Advocate General Corps and an instructor of international law, comments on the requirement that the law of war be able to discriminate between excesses of violence and genuinely necessary military actions, and between lesser and greater violations of the law. Captain Miller's contribution includes an annotated bibliography. Captain Roger Rains of the Department of English reviews two significant books that offer, on the one hand, thoughtful analyses of the theoretical underpinnings of the laws of war and, on the other, a shocking and provocative appraisal of recent dispositions toward the law.

EVENTS

War and Morality Symposium - The philosophy faculty of the Department of English will sponsor a Symposium on the topic of War and Morality on 1 and 2 May 1980. This conference, bringing together some of the foremost commentators on the subject, promises to be an important event in the Military Academy's academic year.

The Symposium will begin with a discussion of "Morality and Nuclear Warfare" at 1500 hours on 1 May in the West Point Room of the Cadet Library. Participants will be Professors Richard Brandt of the University of Michigan, Thomas Nagel of Princeton, and Robert Gurland of NYU. At 1915 hours in Mahan Hall Auditorium the next group of speakers--Professor Michael Walzer of Harvard, William Barrett, Visiting Professor, USMA, and LTG (USA, Retired) William R. Peers, the leader of the Army's My Lai Inquiry--will address "Individual Responsibilities in War." The Symposium will conclude with a panel on "The Morality of Military Intervention" at 0900 hours on 2 May in the West Point Room. Speakers will be Professor Guenter Lewy of the University of Massachusetts, Mr. Telford Taylor of the Columbia Law School, and Professor Marshall Cohen of CUNY.

Symposium sessions, open to the members of the West Point community, are intended to stimulate reflection on moral issues of profound significance to private citizens and military professionals alike.

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FEATURE ARTICLE

A DIALOGUE ON THE LAW OF WAR

by

Captain James L. Narel
Captain Michael W. Taylor

A crowded bar at an officers' club. VICTOR sits at a small table. He is alone but is exchanging friendly remarks with officers seated nearby. His companion, JUSTIN, has gone to the bar for beer and now returns with an adequate supply.

JUSTIN: Man, I've been looking forward to a couple of cool ones all day. T.G.I.F., Buddy. This has been a busy week.

VICTOR: You said it. And frustrating, too. Between trying to do all the routine stuff and responding to all the flaps, a person barely has time to implement the training schedule, such as it is. The highlight of the week was supposed to have been a five-mile road march, you know, just to see if all the engines would still crank. But the C.O. had me scrub it because of "costs."

JUSTIN: Well, what's a little thing like training? What do you think this is, an army or something?

VICTOR: Sometimes I wonder. What really frosts me is scrubbing valuable training and replacing it with filler like Geneva Conventions or U.C.M.J.

JUSTIN: We just did Geneva Convention this week. Turned out to be rather interesting, as a matter of fact.

VICTOR: You're kidding.

JUSTIN: No. We had the film, "Geneva Conventions and the Soldier," which is a decent flick, and you should have heard the discussion. The guys had a lot of questions and some even stayed around to talk afterward.

VICTOR: Yeah? Well, if you still have the film, I'll send one of my lieutenants over to borrow it. In fact, I'll make him a special deal; he can get it, and he can show it. I'll be conveniently absent. I can't face another hour of that bull. None of us believes it. We pitch it to satisfy a DA requirement.

JUSTIN: Come now. I can see where a person might have some trouble understanding a few of the provisions, but I'm sure you agree with the basic objectives of the Law of War. Furthermore, it has to be taught sometime, and it ought to be taught by qualified and committed instructors--and that includes you.

VICTOR: Just between you and me, buddy, I think it's a heap of hypocritical rubbish. We put it on the training schedule, and we pay lip service to it, but nobody really believes it. You don't really think anybody gets fussy about "the law" in the middle of a firefight, do you?

JUSTIN: I think the law can be observed in combat, yes. What's more, I think we've got a fairly decent record in that regard. Granted, our failures are widely reported, but I think most soldiers in most circumstances exercise the kind of restraint that the law requires.

VICTOR: You've got rose-colored glasses on, kid. C'mon, you know what went on in the 'Nam. The stuff that got publicized was just the tip of the iceberg. War is dirty business and you can't expect to win if you won't take your gloves off.

JUSTIN: I don't think my view is all that naive. And, at this point, all you're doing is throwing cliches at me. Yeah, there were problems in Vietnam. It was a new kind of war for us, and many of our people, including officers, were not prepared for some of the situations they ran into. But to admit that there were violations (and I still maintain that most Americans were not involved in violations), or that unconventional war creates new kinds of pressures on the law, is not the same thing as saying that the law was ignored or is obsolete.

VICTOR: It was obsolete when it was invented by politicians and namby-pamby international lawyers! Those people don't know war. How can you agree to let yourself be saddled with a bunch of artificial restrictions when you're engaged in a fight to the death? You think the enemy is going to play nice just because there are some politeness statutes on the books? You carry your respect for the law out to the bush with you and you're gonna get yourself--and some other good soldiers--blown away.

JUSTIN: Whoa! As usual, Best Friend, your mouth is outdistancing your understanding of the issue. At the risk of introducing some rationality into an otherwise interesting discussion, let me point out a few things about the principles that underlie the Law of Land Warfare. The two concepts that give rise to the law are "military necessity" and "proportionality." Granted, these are limiting factors--that is, they identify some things that are prohibited by convention--but they are not dangerously restrictive, as you imply. The first concept simply says, "Even though there's a war on, you shouldn't use violence when it serves no military purpose." In other words, you don't bomb an undefended town just because you've got some leftover ordnance; and you don't shoot an enemy prisoner

for sport. The second principle, proportionality, says, "Don't use more violence than the situation warrants." You don't call a B-52 strike, for example, on a city full of civilians just to get three snipers. You see, the law isn't preventing you from doing what you must in a war. It's merely trying to reduce the unnecessary suffering and destruction.

VICTOR: It seems to me that you--and the law--are being oversimplistic. You imply that there is some clearly recognized distinction between "undefended" settlements and hostile ones; between civilians and enemy combatants. If that distinction were obvious, we might be able to talk about "unnecessary" violence. But in the real world it's just not like that. In 'Nam some peaceful looking villages were shelters for VC, or were supply caches or operations centers. And many times it was a "civilian"--a woman, even a kid--that zapped some unsuspecting GI. I say the Law of War is silly. It's worse than silly; it's dangerous to the people who have to go out and fight the war.

JUSTIN: I think your objections are well founded. In the real world the distinctions can be blurred. But I also think that part of the reason that you are so resistant to the idea of moral and legal restraints is that you focus exclusively on unconventional war where there are so many unresolved issues. Just because distinctions can be blurred and in guerrilla war frequently are, it doesn't follow that there are no clear-cut cases in which we have an obligation to restrict our use of violence. Would you condone one of your men shooting an infant to death for no reason?

VICTOR: Of course not. That would be wanton cruelty. It would serve no purpose.

JUSTIN: You've just defended the principle of military necessity. You see, even in a combat zone--even one in an unconventional war--some uses of violence are inappropriate.

VICTOR: Sure, given the extreme case. It's a simple matter to condemn cold-blooded, gratuitous murder. But it's the restriction of legitimate means of combat that I object to.

JUSTIN: Ah, don't you see? The principle is exactly the same. In fact your use of the word "legitimate" demonstrates your own agreement that we ought not to pull out all the stops even in war. Once that is admitted, it becomes a matter of identifying appropriate limits.

VICTOR: Look, I'm going to be very frank here. I'll grant you your point: I'm opposed to violence, even in the context of war, if it serves absolutely no purpose. But the way you say, "identifying appropriate limits" is so casual, so academic and dispassionate that it annoys me. It's not so neat and tidy out there, man. All of this talk needs to be seen in the context of a combat environment. Who's got time to philosophize or the ability to be cool and rational when he's fighting for his life? I mean, it's scary

out there. When you take fire, you don't worry about whether there are any innocent bystanders in the vicinity. And you certainly don't put in a call to your lawyer to ask him what's okay in the way of responses. You act--or rather you react--instinctively. You shoot back, and you call for fires, and you jockey for position. And all the time you're scared, and you're tired and confused. And the fact is, you just don't think a whole lot about the Geneva Conventions.

JUSTIN: Well-said. I'll agree that in the heat of battle you don't have the luxury to be a Socrates. That's why you had the Geneva Conventions classes and field training before the battle. When you called for fire, you acted out of military necessity. If you took prisoners, you didn't have to decide whether to treat them humanely--you already knew what was expected of you. Furthermore, if you claim that men utterly ignore moral or humanitarian considerations in the heat of battle, I'd say you're arguing what you think is the case rather than what ought to be. Even if it is true that some soldiers do not consider morality, this doesn't mean that they ought not to.

VICTOR: But my argument is that they can't reasonably be expected to. You want to know my definition of military necessity? I'll tell you: military necessity means victory. We've had a belly full of non-victory in this army already, and I, for one, do not expect to have to go through that experience again. I'll talk "is" and "ought" with you, Justin. It is the case that soldiers lose wars that they don't--or aren't permitted to--fight to win. It ought to be the case that they fight to win.

JUSTIN: Ought they to win at the expense of their own humanity? Is victory worth any cost?

VICTOR: I don't think the professional soldier has the luxury to think otherwise. Look, I told you I wouldn't let my men wantonly kill an innocent kid. I meant it. But I believe that what you have termed military necessity applies here in a soldierly sense rather than in a moral sense. Butchering the local kids is unlikely to contribute to the accomplishment of my mission. It's more likely to frustrate my own cause.

JUSTIN: Okay. What you're pointing out are the utilitarian justifications of the Law of War. One of the reasons nations have been willing to agree to certain constraints is that they see these as being in their own interest without giving any advantage to the enemy. If we formalize the policy of not mistreating one another's children, we are gaining a measure of security for our own kids without giving up any military prerogatives. And this is the case for many of the law's provisions, like the ways to treat prisoners and wounded and the rule against blowing up churches or monuments.

A third officer, HENRY-DAVID, approaches the table from the bar.

HENRY-DAVID: Hey, guys. I could hear you two from across the room. I was going to come over to quiet you down, but I'm more interested in getting in my two cent's worth.

JUSTIN: Greetings, H.D. Welcome. I'm sure I can count on your support.

HENRY-DAVID: Don't be too confident of that. I've got some pretty strong opinions on this subject. I'm ready to challenge you both on the issue of utility. Vic, I heard you say you'd prevent your men from zapping kids because it wouldn't contribute to accomplishing your mission. But what if it did, man? What if you were in a situation in which harming the child, or using him as a hostage would be to your advantage?

VICTOR: I'll be honest with you. I don't know. I mean, I want to say I wouldn't, but you could invent a situation in which a lot might be riding on the decision--the lives of my men or a critical objective.

HENRY-DAVID: I appreciate your candor, Vic. You see, Justin? When your justification for moral restraint rests on utility, you can easily find yourself with no restraints at all. When we adhere to a law solely because it's useful, we aren't being moral at all; we're being self-serving. And when we try to pass this off as righteousness, we're just being hypocritical.

JUSTIN: Well, I won't disagree with your point, as stated, but you're implying that mutual self-interest is the only underpinning of the law. Actually, I think it's much more pluralistic. We recognize the appropriateness of restraint on more traditional grounds, that is, a consensus that some acts like gratuitous violence are inherently wrong. We are then able to agree to prohibit them, even though many other acts of violence are not prohibited, because it is in our interest to do so.

HENRY-DAVID: And you see nothing hypocritical in this?

JUSTIN: Not really. It's just a fact of life. It's as though we're saying, "While we are opposed to violence, we are, afterall, engaged in a war, which is the systematic application of violence to achieve our ends. But since we can agree that some violent acts don't serve any purpose, even in war, we will refrain from those acts."

HENRY-DAVID: But don't you see that you are flirting with an inconsistency? If you believe that violence is wrong to begin with, how do you justify being in a war at all? And if the war is justified, why do you claim that some few of the violent acts in the war are wrong?

VICTOR: All right! He's got you there, Justin, and I agree with him.

HENRY-DAVID: You don't, really, Vic. I'm fixing to explain that you and I are at precisely opposite ends of the spectrum. You object to a law of war because you think that once a policy of violence has been sanctioned, no violent acts can legitimately be prohibited. My argument is that the present law is too permissive, not too restrictive. You see, I maintain that warfare is inherently evil; that the destruction it causes is a blot on mankind's claim to rationality; and that a law of war that is not hypocritical would not permit us to bomb factory workers or threaten whole cities with nuclear obliteration. I find the present law contemptible because it masks the horror of what we do with a facade of moral rectitude.

JUSTIN: Wow! I might have expected that argument from a pacifist, but not from an Army officer. How can you maintain such a viewpoint and stay in uniform?

HENRY-DAVID: It ain't easy, pal. The short answer is that I think there are some things that are even worse than war, things to which I am so opposed that I am willing to resort to the evil of violence to prevent their coming to pass. But while I see war, in this context, as a lesser evil, it is an evil nonetheless, and I want every possible restraint to be maintained. The conventions decreed at Geneva and The Hague are pitifully inadequate.

JUSTIN: Perhaps, but let's see about your consistency. If I understand you correctly, you're saying that you'll do something you consider intrinsically wrong--violence, killing--to prevent a greater wrong.

HENRY-DAVID: Right.

JUSTIN: So how are you different from Vic?

HENRY-DAVID: He doesn't feel that any of these things are instriniscally wrong and should be prohibited. I could never condone the killing of an innocent child, but Vic implies that it might be okay if the payoff is great enough.

JUSTIN: Vic?

VICTOR: Well, I certainly would not be happy about it, but I guess I have to say that I don't think it's necessarily wrong to sacrifice one life to save many.

HENRY-DAVID: I know both of you guys saw the movie, Apocalypse Now. The last scene with Willard and Kurtz raises the issue of fighting justly and respecting the law. Kurtz had obviously abandoned that policy. How would you judge him, Vic?

VICTOR: I think more people agreed with Kurtz than would admit it. He tells the story about the good-guy American Special Forces trying to win the hearts and minds of the people by innoculating the kids against disease. The VC come through later and teach the villagers a lesson. They hack off all the vaccinated arms. The VC win the village while the Americans muddle along and finally lose because they play the game according to Justin's Geneva Conventions.

JUSTIN: And your solution is. . .?

VICTOR: To accept the fact that ethics depends upon the situation. If everyone plays according to the rules agreed upon, fine. But if the other side butchers villagers or prisoners, or uses outlawed weapons or practices, we take off the restrictions and go for their throats with everything we have.

JUSTIN: H.D.?

HENRY-DAVID: Kurtz was either insane, or a criminal, or both. Because others acted outside the law, he felt justified in placing himself above it. In order to reconcile himself to "the horror" of war he extinguished his own humanity.

VICTOR: He had to act inhumanely in order to protect the principle of humanity.

HENRY-DAVID: ". . . we had to destroy the village in order to save it!"

JUSTIN: Uh, perhaps we need to back off a bit, huh? I know there's no way to isolate emotions from issues like these, but I think the intensity of our feelings can obscure the rational middle ground.

HENRY-DAVID: Fine. You talk, we'll drink.

VICTOR: Right, but let's drink our own beer. That's my glass you just picked up, Ol' Buddy.

JUSTIN: As I see it, the Law of War is consistent with both your positions. H.D., the whole point of the law is to preserve what we can of our humanity even when we commit ourselves to a life or death struggle. I know you think it doesn't go far enough, but I say that, in this wicked world, it's a whole lot better than nothing. At the same time, Vic, the law does not prevent you from doing what is militarily necessary. Go for their throats, sure enough! But go for the throat of the enemy combatant, not of the hapless bystander.

VICTOR: Easier said than done.

JUSTIN: True, but the important first step is recognizing, and embracing the principle that as professionals--not mere "managers of violence"--we have a responsibility to protect the weak and the innocent so far as we are able. Wow! You can tell I've had a couple of brews, otherwise I'd never be giving this sermon.

VICTOR: Baloney! You're forever getting melodramatic. But in this case you're preaching to the choir. Without getting gushy about it, I think we all base our choice of a military career on some approximation of that sentiment, at least in part. But let me bring up a different kind of problem regarding laws of war.

HENRY-DAVID: Shoot!

VICTOR: However sound the concept is philosophically, I don't see much likelihood that a law of war will ever be observed or enforced. I mean, if we can't come to full agreement in a friendly discussion about the matter, is it possible to convince others?

HENRY-DAVID: We don't have to "convince" anybody. The Geneva Convention, inadequate as it is, is not just a philosophic concept; it's the law of the land. Our army is required to observe it and soldiers who don't observe it can, and should, be prosecuted.

JUSTIN: I don't think it's that simple.

VICTOR: You bet your life it's not. If one of my people is in a tight spot and makes a decision under stress that turns out to offend some lawyer up at Corps, do you really think I'm gonna nail him? No way.

HENRY-DAVID: Are you saying that you'd condone something that you knew was a breach of the law? Because if you are saying that, you aren't showing much regard for the oath you took at your commissioning ceremony.

JUSTIN: Fortunately, I don't think it has to come to that. Something we need to remember about the law is that it has been written and repeatedly revised taking into account the realities of war. The contribution of military people--combat veterans--has been much more extensive than you might suppose. The law recognizes the need for judgment and compassion in dealing with those who act in dangerous, frustrating, and chaotic circumstances.

HENRY-DAVID: Wait a minute! It sounds as though you're draining all the remaining force from an already weak law. That kind of reasoning leads to paying lip service to the law and to smiling or looking the other way when violations occur. I can just hear the voices of some officers of that persuasion after a My-Lai-like atrocity. "Gosh, that's terrible, but, then, there's a war on and these things will happen. Make sure no one finds out or some of our fine young troopers will get in trouble."

VICTOR: Well, let's take a look at that from the other side. What are we supposed to say? "Tough luck, Sergeant So-and-So. You've been a fine soldier and leader; you've carried out all my orders and repeatedly faced death at my command. But you've slipped up here, so I'm gonna serve up your head on a platter." No way!

JUSTIN: As I see it, there needs to be room for personal judgment in individual cases--now hold on, H.D.--because the circumstances sometimes define the nature of the crime, if any. But that judgment must be mature and responsible, and, in my view, that would never allow for a failure to take corrective measures in the face of a breach of regulation or law. Furthermore--let me finish, Vic--the law is capable of discriminating in these matters. In civil life, for example, you'd never argue that someone should overlook a homicide because he personally felt that the killer was justified; it's up to the courts to make that determination.

VICTOR: But war is not civil life--it's not even civil, for that matter. You can't judge a person who commits a rash act in combat the same way you would a drug pusher or a pimp in Los Angeles. The soldier is trying to do his job in the most demanding of circumstances. He may be scared to death, he may have just seen his buddy killed. You mentioned compassion; are you gonna just string the guy up?

JUSTIN: No, but I am going to report it and insure that all mitigating and extenuating circumstances are considered.

HENRY-DAVID: Well, here's something that needs to be understood on that score. The "normal" circumstances of war--the fear, the anger, the frustration--are not (and rightfully not) considered mitigation or extenuation. The law of war is intended to apply in war. It says you will not line up civilians in front of a ditch and shoot them even when you're angry or frustrated or scared. That's the whole point.

VICTOR (Skeptical): Hmm. Maybe so, but I'll tell you right now, next in importance to the mission, on my list, is taking care of my people. I'm gonna think long and hard before I start reaching for charge sheets.

JUSTIN: Most understandable. But I think you should begin demonstrating your concern for your people in that regard now. Don't wait until you get into combat.

VICTOR: Huh?

JUSTIN: Your people--all our people--need to be aware of the provisions of the law, of their legal requirement to obey it, and of the reasonableness of the whole concept.

HENRY-DAVID: Your last concern is, I believe, beyond hope of fulfillment. Without implying any disrespect whatever of our subordinates, I think it unlikely that many will be too concerned about the finer legal or philosophic subtleties of the issue.

JUSTIN: Of course not. I didn't mean that we should expect or demand that. But the seriousness and the respect with which they ultimately regard the law of war is going to be a direct reflection of our own. If we regard it cynically, or just pay lip service to it, or act as if we wish that it would go away, they will adopt the same attitude. In that respect it's exactly like many other things: the troops won't take vehicle maintenance or CBR training seriously if we act as if it's a joke.

HENRY-DAVID: I hate to see you put this in the same context. It is, after all, a life and death issue.

VICTOR: Hey, in war everything is a life and death issue.

JUSTIN: Even the Geneva Conventions?

VICTOR: Why do I have this feeling that I just got backed into a corner? (PAUSE) I've got another feeling that you guys are waiting for me to say I'm going to teach that class.

JUSTIN and HENRY-DAVID: So?

VICTOR: So, okay. Who wants another beer?

DEGREES OF RESPONSIBILITY AND THE LAW OF WAR

by

CPT Joel D. Miller, J.A.

Legal findings in war crimes trials go beyond determining simple guilt or innocence. Fixing the degree of responsibility is one of the court's concerns that other persons--including writers and soldiers--frequently fail to consider. The law of war, like the laws of our domestic legal system, is greatly affected by the concept of responsibility; indeed, one can apply the law of war justly only by recognizing that the law's provisions, however absolutely they are stated, must be applied in full consideration of the subject's responsibility.

Exactly what is meant by degrees of responsibility? It cannot be gainsaid that with regard to homicide, the following circumstances can and ought to be readily distinguishable. Consider, first, a man who returns from work to discover his wife and another man in flagrante delicto (legal Latin for "while the crime is blazing"). He consigns the spouse and her paramour to the spirit world with his trusty shotgun. Next, take the case of an individual who determines that a rival stands between him and the title capo di tutti capi (boss of all bosses) and who acquires the services of a hit person to eliminate his competitor. Finally, consider a driver who carelessly accelerates when he should have braked and brings his vehicle to rest atop a now lifeless pedestrian. To be sure, each of the above cases constitutes homicide. Just as surely, they do not all constitute murder. The law, in order to achieve fair verdicts, must distinguish between these crimes, else it will soon be discarded in favor of a system better able to isolate the truly harmful elements of society. Also, the sentences in these cases are not likely to be the same. The law of war must engage the same kind of template; failure to make qualitative distinctions undermines its ability to govern conduct.

If the law were to be applied rigidly with no view to degrees of responsibility, humanitarian conduct in war would never be a consideration; one would have no incentive to choose a less than draconian measure. This is a logical theoretical conclusion. But in recorded war crimes trials, have degrees of responsibility been recognized? Most military professionals are familiar with the death sentences of Wirtz, the doctor of Andersonville and of Yamashita, the "tiger of Malaya." The results of the famed Nuremberg Tribunals are also widely known, and there, since the "winners" were trying the "losers," critics have contended that officials had license to be absolutist in rendering their judgments. But Nuremberg provides indisputable evidence for the "responsibility" thesis. Of the twenty-two defendants who faced the Tribunal, all of whom held the highest positions of power in the Nazi councils of war, four were given sentences of twenty years or less, and three were totally acquitted. Subsequent Nuremberg

proceedings included members of the high command, the heads of ministries, the industrialists, the medical experimenters, the officials of the judicial system, and the S.S. Group officials. Of the 147 defendants, twenty-one were sentenced to hang, fourteen received life imprisonment, and seventy-eight received sentences ranging from twenty-five years down to one and a half years. The remainder were either acquitted or died prior to the rendering of a verdict. These individuals were not accused of petty offenses; all were charged with grave breaches of the law of war. The diversity of sentences is irrefutable evidence that varying degrees of responsibility were considered.

One further point should be addressed. "Responsibility" refers to both culpability, which is legal accountability, and to factual accountability, which assesses how the violation should be punished. Since a single tribunal has powers to make both legal and factual determinations, it is sometimes difficult to differentiate the two sub-divisions; therefore, the term "responsibility" appropriately describes the whole process.

How can responsibility be ascertained? Underlying the law are three major principles that not only govern the law itself but provide guidance in circumstances in which the law is unclear. These principles are: Military Necessity--any force necessary to achieve the defeat of the enemy is justified; Humanitarian Considerations--violence unnecessary for the achievement of the goal should be forbidden (subsumed under this principle is the notion of proportionality); Chivalry--fraud or deceit ought to be avoided. These principles are not separate, mutually exclusive, or incompatible. To the contrary, they are interwoven and together constitute the fabric of the law of war. The specific rules regarding the use of weaponry and strategies and the protection of individuals during war reflect these principles, and their admixture governs the fixing of responsibilities. For example, if a decidedly inhumane act has little or no military necessity, or is disproportionately violent when compared to the military importance of its objective, the responsibility, from legal and moral perspectives, increases.

An exhaustive treatment of those principles is beyond the scope of this essay. Suffice it to say that if one is confronted with a situation in which a violation of the law of war is committed, the extent and severity of the violation are as important as the breach itself. For example, if one determines that, contrary to the law of war, a wounded prisoner must be left to die, several factors enter into the degree of responsibility. How important was the mission that would have been impaired had the prisoner been brought along? All missions would not justify leaving the prisoner. Was the prisoner left with adequate food and medical supplies to allow a possible rescue? Was the prisoner killed? Would the mission have been compromised had adequate care been provided? These and other factors would determine the responsibility. The issue is obviously complex.

The three principles play an important role in the application of the law of war. Historically, laws of war have been part of armed conflict for almost as long as men have organized into armies. Many of the early laws of war were culture-relative. For example, agrarian societies had rules condemning the wanton destruction of crops. Codes of chivalry developed as civilizations became more sophisticated and notions of professional behavior developed. Technological advance ultimately resulted in greater constraints. The reasons are readily apparent; first, it would make no sense to devastate that which one would seek to use as a resource; second, barbaric practices increase enmity and decrease the probability of a lasting peace; third, the utter devastation of an enemy denigrates one's concept of a humanity shared with the diverse peoples of the world. Early attempts by western civilizations to codify the laws of war began in earnest after the Thirty Years War, as divisive and complex a conflict as the world had known to that time. The codification of the laws of war through the Hague Regulations and the Geneva Conventions was a response to the horrors of recently fought conflicts.

As the laws of war developed (and continue to develop), assessment of responsibility has assumed a more profound role. Plans to form international tribunals to deal with war crimes and criminals can be seen as an attempt to mitigate the conqueror-conquered syndrome and to assess responsibility more fairly. If one can reasonably assume that a fair trial is possible in the case of a violation of the law of war, then the extent and degree of the violation become factors in the decisions regarding corrective or punitive actions.

Degrees of responsibility must be a consideration in the application of the laws of war. Ignoring qualitative distinctions undermines the three principles. Just assessment of responsibility is possible only when the principles are jointly considered. This is critical, for if the law fails to be just, it will be discarded and its value in limiting the destruction and suffering that attends war will be lost.

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BOOK REVIEW: ETHICAL GUIDELINES FOR A PERIOD OF TURMOIL

by

Captain Roger A. Rains

The Soviet military intervention in Afghanistan has reportedly included violations of internationally-recognized proscriptions against the use of toxic chemicals and the intentional killing of noncombatants. Such claims have revitalized the perennial debate over the value and efficacy of the laws of war. Concerned individuals have once again recognized the need to develop a clearer understanding of the complex relationships that bind morality, foreign policy, and military force. For American military professionals, these contemporary events demonstrate that it is not sufficient to be conversant in the vocabularies of strategy, diplomacy, and leadership; we must be fluent in the lexicon of ethics as well.

Fortunately, a number of qualified authors have recently published works addressing the moral dimensions of military decision-making and the viability of the laws of war. Two particularly noteworthy volumes are Lieutenant General (USA, Retired) William R. Peers's The My Lai Inquiry, and Colonel Malham Wakin's Morality and the Military Profession.¹

In The My Lai Inquiry, General Peers recognizes the full range of tragedies that occurred in the vicinity of Son My village in mid-March 1968. In chapter after chapter, he unfolds the gruesome narrative of murder, rape, and misprision that shocked millions of American citizens who thought, as Congressman L. Mendell Rivers had, that "our boys would never do anything like that."²

Regrettably, even General Peers views his report as an incomplete history and explanation of the events surrounding Task Force Barker's operation. In fact, his inability to solve the many mysteries of My Lai may disappoint historians and psychologists.

But, for the professional exploring the moral realities of our day and questioning the efficacy of his own personal rules of conduct as well as the Army's institutional ethics, The My Lai Inquiry transcends the limited descriptive values of history and psychology. The form and substance of the book make it clear that General Peers's objectives are therapeutic and normative.

He shares Ron Ridenhour's belief that if soldiers "truly believe in the principles of justice and the equality of every man . . . that form the very backbone that this country is founded on, then . . . [they] must press forward a widespread and public investigation of this matter. . . ." To do less would be to reject the values that ennoble service to the nation;

to do less would be to strike the first note of the death knell for the professional dimension of military service. These implicit, highly demanding objectives force General Peer's analysis to its uncomfortable conclusion: although the official investigation, concluded by his team in 1970 and made public in multiple volumes in 1974 and 1975, did much to restore confidence in the military, many of the persons criminally and morally culpable have escaped justice. Because men, including senior military officers who refused to divulge what they knew about the cover-up and misguided generals who inappropriately exercised their court-martial convening authority, have failed to do what professional standards and justice demand, the therapy, so much needed by the nation and its soldiers, has been only partially effected; and the values that are the essence of the military profession have been only partially reaffirmed.

Viewed as a whole, The My Lai Inquiry represents General Peers's continuing effort to expose and cure the moral diseases that manifested themselves at and after My Lai. He concludes that only by identifying and fully analyzing the harsh moral realities of war can the professional discharge his responsibility to the American people and their Army.

In order to appreciate fully the broad range of issues implicit in General Peers's commentary, the reader requires a basic conceptual knowledge of the theoretical relationship of ethics and the profession of arms. The recent volume, War, Morality, and the Military Profession, provides a ready reference to much of this necessary groundwork.

Colonel Malham M. Wakin, Associate Dean and Head of the Department of Philosophy at the United States Air Force Academy, and the members of the Academy's philosophy faculty have collected an impressive variety of articles which focus the reader's attention on the two major ethical dimensions of military life: the inherently value-laden character of the profession of arms and the highly problematic relationship between war and morality.

Part I of the volume includes fifteen pieces by such well-known authors as Samuel P. Huntington, Morris Janowitz, Sir John Winthrop Hackett, Sam C. Sarkesian, Thomas M. Gannon, and Charles C. Moskos, Jr. Here, Wakin not only provides a compendium of three decades of ideation regarding ethics and military professionalism but also mounts a strong argument supporting the functionally mandated character of those values traditionally recognized as "military virtues." Wakin's outlook is unabashedly Aristotelian, and his intention, like that of General Peers, is to provide reliable facts and opinions in the hope that they will foster individual reflection likely to be manifest as virtuous action.

A similar didactic tone pervades the selections on just war theory and justice in war, which constitute the second half of the volume. Here sixteen pieces by such notable scholars as Telford Taylor, Richard Brandt, Elizabeth Anscombe, Donald Wells, Richard Wasserstrom, Thomas Nagel, and

R. M. Hare, afford the reader an opportunity to examine the most significant aspects of the perennial debates surrounding the moral justifiability of war and the moral treatment of the innocents who, like the inhabitants of My Lai, are inevitably caught up in conflicts. Each of these selections is skillfully introduced, as are the two major subdivisions of the book, and the logical progression of articles brings the theme of each moral issue into clear focus.

In terms of its topicality and inclusiveness, this anthology is without peer. Michael Walzer's recent book, Just and Unjust Wars; the Philosophy and Public Affairs reader, War and Moral Responsibility; and the Basic Problems in Philosophy Series anthology, War and Morality, are much narrower in scope and fail to include thought generated within the ranks of the military profession. The Wakin volume is a catalyst for the identification, investigation, and affirmation of the close relationship of moral values and the profession of soldiering. Echoing the sentiments implicit in General Peers's argument, Wakin contends that,

Unless the profession captures the full dedication of those who are competent both morally and intellectually to meet the challenges, unless it becomes for the most talented a complete and fulfilling vocation, it is likely to fall on hard times. In the hands of the mediocre or the morally insensitive, the vocation of arms could find its noble purpose distorted with tragic consequences for all humanity.⁴

The tenor of the times exerts a powerful impetus on every professional soldier to join with General Peers and Colonel Wakin in examining both personal and public norms regarding the vital connections between morality, foreign policy, and military force. In doing so the soldier may succeed in simultaneously revitalizing the traditional ideals of service, endorsing the basic values of our society, and fostering the increased effectiveness and viability of the military institution.

ENDNOTES

¹William R. Peers, The My Lai Inquiry (New York: Norton, 1979) and Malham M. Wakin et al, War, Morality, and the Military Profession (Boulder, CO: Westview Press, 1979).

²I. Mendell Rivers as quoted by Peers, p. 21.

³Ron Ridenhour's letter, dated 29 March 1969, as quoted by Peers, p. 7.

⁴Wakin, p. 9.